YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale School of Law.

SUBSCRIPTION PRICE, $4.50 A YEAR SINGLE COPIES, 70 CENTS

Canadian subscription price is $5.00 a year; foreign, $5.25 a year.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

THE EFFECT OF THE FEDERAL SAFETY APPLIANCE ACTS ON WORKMEN'S COMPENSATION.

The Safety Appliance Acts[1] impose an absolute duty upon all railroads engaged in interstate commerce to use and keep in repair certain specified equipment on their rolling stock, and provide a penalty for each violation. No right of action for personal injuries arising out of a breach of such duty is expressly given by the terms of the statute, but it is provided that assumption of risk shall be no longer available as a defence, and that the imposition of the penalty shall not be construed to relieve the carrier from liability in any remedial action for the death or injury of a railroad employee. Is the implication of a specific common-law remedy for personal injuries so irresistible that we must conclude that a state is unable to substitute a remedy under the workmen's compensation act for an employee engaged in a purely

[1] Act of March 2, 1893 (27 Stat. at L. 531), amended by Act of March 2, 1903 (32 Stat. at L. 943); supplemented by Act of April 14, 1910 (36 Stat. at L. 299).

intrastate employment? The New York Court of Appeals has recently answered this question in the affirmative in the case of *Ward v. Erie Ry.* (1921) 230 N. Y. 230, 129 N. E. 886. The question is almost one of first impression. The Circuit Court of Appeals has given the same answer in a brief decision without any discussion of the authorities,[2] and this decision has since been approved in a dictum by another federal judge.[3]

It is important, in the determination of this question, to note that this statute preceded even the Federal Employers' Liability Act, the forerunner of all state compensation acts, and that, therefore, the attention of Congress could not have been directed to the necessity of specifying any particular form of remedial action. Is it not likely that Congress intended merely to render unavailing the defences referred to in the statute without prescribing any remedy? If we disregard the decisions referred to above, the common-law right of railroad employees to damages for personal injuries received in the course of their employment is completely abrogated in the great majority of states. Those engaged in interstate commerce come within the purview of the Employers' Liability Act, while those doing intrastate work are covered by the workmen's compensation acts. According to the modern view that common-law actions for personal injuries between master and servant are not suited to the times, and that some form of industrial insurance is far superior, this result is highly desirable; and the Supreme Court has held that the New York Compensation Act is a very excellent substitute.[4] But if, on the other hand, these decisions are allowed to stand, we have driven a wedge between the two prevailing systems of compensation, and the common-law action, having been once exiled, creeps in again. The result is unfair and tends to discrimination and inequality among railroad men, for the interstate employee must be content with his compensation, while the intrastate employee may elect either to take compensation or to sue for damages. Surely, we should adopt the view that is most consistent with modern development, unless we are precluded from doing so by the authorities.[5]

The expressed intention of the Safety Appliance Acts is to preserve the safety of travellers and employees. Irrespective of the express provisions of the statute, we need have no difficulty in determining

[2] *Ross v. Schooley* (1919, C. C. A. 7th) 257 Fed. 290.

[3] *Director General of Railroads v. Ronald* (1920, C. C. A. 2d) 265 Fed. 138, 144.

[4] *N. Y. Central Ry. v. White* (1917) 243 U. S. 188, 201, 37 Sup. Ct. 247, 252, per Pitney, J.: "The statute under consideration sets aside one body of rules only to establish another system in its place. . . . Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumed the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary."

[5] *Knowlton v. Moore* (1900) 178 U. S. 41, 77, 20 Sup. Ct. 747, 761, per White, J.: "We are . . . bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

that a right of action is given to an injured employee, for it is elementary law that a member of the class for whose benefit a statute has been enacted has a right of action against an offender for the damages sustained through a breach of the statutory duty. The Supreme Court of the United States has ruled that this statute applies to all interstate railroad equipment, whether engaged in interstate commerce or not, and that even intrastate employees may recover damages in a remedial action under the Act.[6] The Court's language, construed broadly, might sustain the contention of the New York court, but we must remember that the question in that case was whether or not the employee should have any remedy at all, and did not involve statutory changes in the common law.

By what law is the remedy to be determined? It is said[7] that it must be by the law existing at the time of the enactment of the statute. It is submitted that this is not correct. While, in matters exclusively under federal control, we may say that there is a common law of the United States,[8] still, generally speaking, there is no national common law, and the federal courts apply the law of the locality as modified by state and federal statutes.[9] The power of Congress must include authority to deal with a host of acts, not interstate commerce in and of themselves, because of their relation to and influence upon interstate commerce.[10] But the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rules of the state law.[11] Should we say that Congress has here entered the field and prescribed the remedy? Had a specific remedy been given, we must have admitted that that remedy could not be altered or impaired by a state;[12] and, when it can be readily implied that Congress intended to assume absolute control, a state may not interfere.[13] But, through a long line of decisions, the Supreme Court has held that Congress, in

[6] *Texas & Pacific Ry. v. Rigsby* (1916) 241 U. S. 33, 41, 36 Sup. Ct. 842, per Pitney, J.: "Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travellers occasioned by the absence or insecurity of such safety devices."

[7] I. e. in the principal case.

[8] *Murray v. Chicago & N. W. Ry.* (1894, N. D. Iowa) 62 Fed. 24, 42.

[9] *Smith v. Alabama* (1888) 124 U. S. 465, 478, 8 Sup. Ct. 564, 569, per Matthews, J.: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

[10] *United States v. Ferger* (1919) 250 U. S. 199, 39 Sup. Ct. 445.

[11] *Smith v. Alabama, supra* note 9, at p. 477.

[12] *N. Y. Central Ry. v. Tonsellito* (1917) 244 U. S. 360, 362, 37 Sup. Ct. 620, 621, per McReynolds, J.: "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

[13] *Postal Tel. Co. v. Warren* (1919) 251 U. S. 27, 40 Sup. Ct. 69.

legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the states of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the federal legislation.[14] The compensation of injured employees is certainly primarily a matter for state regulation.[15] The fact that interstate commerce is incidentally affected is immaterial.[16] And how can it be said that the substitution of compensation for common-law damages will impair the operation of the statute? The federal case supporting the principal case[17] answers that uniformity in railroad law is essential, and that the liability to pay damages is a spur to the observance of the duty imposed. As to the first reason, the actual necessity is very doubtful,[18] and, as to the second, Congress seems not to have thought it of controlling importance when it enacted the Employers' Liability Act.

---

[14] *Missouri, K. & T. Ry. v. Haber* (1898) 169 U. S. 613, 18 Sup. Ct. 488 (The Federal Animal Industry Act, making it a misdemeanor to transport cattle known to be diseased, did not prevent a state from imposing a civil liability for damages sustained by owners of domestic cattle by reason of such importation); *Reid v. Colorado* (1902) 187 U. S. 137, 23 Sup. Ct. 92 (The same Act did not prevent the states from penalizing the importation of cattle without inspection by state officials); *Savage v. Jones* (1912) 225 U. S. 501, 32 Sup. Ct. 715 (The Federal Food and Drugs Act, prohibiting misbranding, did not prevent the states from requiring to be affixed a statement of ingredients); *Atlantic Coast Line Ry. v. Georgia* (1914) 234 U. S. 280, 34 Sup. Ct. 829 (The Federal Safety Appliance Acts, dealing with the equipment of locomotives and cars, did not preclude the states from legislating concerning locomotive headlights, as to which Congress had not specifically acted).

In *Missouri, K. & T. Ry. v. Haber, supra,* Harlan, J., says: "This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress . . . unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

And in *Savage v. Jones, supra,* Hughes, J., says: "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation . . . is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

[15] *N. Y. Central Ry. v. White, supra* note 4.

[16] *Pennsylvania Ry. v. Hughes* (1903) 191 U. S. 477, 488, 24 Sup. Ct. 132, 135: "It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

[17] *Ross v. Schooley, supra* note 2.

[18] "The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. . . . The field of compensation for injuries appears to be one in which uniformity is *not* desirable or at least not essential to the public welfare." Brandeis, J., *dissenting,* in *N. Y. Central Ry. v. Winfield* (1917) 244 U. S. 147, 168, 37 Sup. Ct. 546, 555.

PRESENT DAY LABOR LITIGATION—STATUTES

Considerable adverse criticism has been directed at the courts for legislating judicially. Whether this criticism is warranted or not is not material to this discussion, but certainly the history and development of labor litigation is for the most part a chronicle of such judicial legislation. The legislatures, it is true, have helped to a considerable degree; yet it is the judiciary that has faced most of the problems and has paved the way for our present rules. The task of the legislatures seems to have been to put many of these rules into statutory form, and also to bring about more or less uniformity between the law of the various jurisdictions. Few rules have taken statutory form that had not already been adopted by the courts in some jurisdiction, and thus the effect has often been simply to give legislative sanction to that which the courts had already formulated. Naturally, however, the legislatures have introduced several new features, and will probably continue to do so to a greater extent in the future, while continuing their task of settling points upon which there is now conflict in the judicial decisions.[1]

One of the first and most natural things for the legislatures to undertake was to establish the unions upon a legal basis. The courts of this country had refused to accept the English view that combinations of workmen were illegal conspiracies, and had not only refused to declare such associations unlawful, but had also declined to enjoin strikes for better wages and working conditions, etc.[2] This privilege of organiz-

[1] The reasons for this hesitancy of the legislatures is merely an incident in the political history of the United States. It is well realized that until recently the legislatures have been mostly dominated by certain political groups, with a result that progressive economic legislation has been obtained only through unusual effort. Fortunately this power has been overthrown generally and results are to be expected, although questions involving industrial relations are seemingly avoided by the legislatures whenever possible. Indeed it should not be overlooked that, in not a few instances, the labor unions have used their great power to procure special legislation which tends to benefit labor at the expense of the common weal. Many would consider the Adamson Act as an instance of such undesirable special legislation. It is believed, however, that the natural conservatism of the people will, in the long run, serve as an effectual check on our legislatures.

[2] Originally, of course, a combination of workmen was illegal in England, and it was not until 1825 that the earlier English statutes prohibiting such combinations were repealed. 6 Geo. IV, c. 129. Before such repeal, however, it was necessary for the American courts to decide whether or not they would adopt these rules, which had been in existence since feudal times. To their credit it can be said that the almost unanimous decision was that such rules would work great hardship upon the people and were unsuited to this country, and consequently combinations of laborers were recognized as legal. The origin of the English rules was explained in *State v. Stewart* (1887) 59 Vt. 273, 9 Atl. 559, where the court says: "The early English statutes, beginning with the middle of the fourteenth century, are to be read in the light of the civilization of that day, and their provisions, to us of the nineteenth century, harsh, illiberal and tyrannical, were but the reflex of the prevalent notions of class distinctions, that shaped and guided the social and political polity of those days." Chief Justice Shaw in *Commonwealth v. Hunt* (1842, Mass.) 4 Metc. 111, says: "All those laws of the parent country, whether rules of the common law, or early English

ing has now been expressly granted by statute in many states,[3] while in others it has been impliedly recognized by legislation enacted to protect some feature of unionism.[4] This question of the legality of a union, however, is of but little more than academic importance, for although it is frequently discussed, there are practically no decisions in this country holding unions to be illegal as such. The really important problem before our courts and legislatures has been to determine what are the rights and privileges of the groups involved in labor disputes, while acting collectively. Preceding comments[5] have attempted to make a short review and classification of the rules established by the courts to govern this industrial relationship, and the present discussion is concerned with the effect of statutory regulations on this subject.

While the legislatures, as already suggested, have enacted many of the rules already put in force by some of the courts, yet there are important statutory changes. One of the changes attempted was to prevent the employer from discriminating between union and non-union men, either in hiring them or in continuing them in employment.[6]

---

statutes, which were made for the purpose of regulating the wages of laborers, . . . not being adapted to the circumstances of our colonial condition, were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the constitution already cited." In the two states that did accept the English rule, the position was quickly abandoned and they now have statutes expressly legalizing such organizations. Pa. Laws 1869, ch. 1242, sec. 1, applied in *Cote v. Murphy* (1894) 159 Pa. 420, 28 Atl. 190; 3 N. Y. Cons. Laws 1909, ch. 88, sec. 43.

[3] The Pennsylvania statute, *supra* note 2, declares that "it shall be lawful for any and all classes of mechanics, journeymen, tradesmen and laborers to form societies and associations for their mutual aid, benefit and protection, and peaceably to meet, discuss and establish all necessary by-laws, rules, etc." Shortly afterwards it was enacted that a refusal was not indictable as a conspiracy. Pa. Laws 1872, ch. 1105, sec. 1; see 3 N. J. Comp. Stat. 1910, ch. 128; Minn. Laws 1917, ch. 493, sec. 1; Wash. Laws, 1919, ch. 185; Wis. Laws 1919, ch. 211.

[4] "If, as we think, the statute expressly creates or recognizes the right of trade unions to be protected in the use of labels for trade union purposes, the suggestion that the association represented by the plaintiff is an unlawful association falls of itself." *Tracy v. Banker* (1897) 170 Mass. 266, 49 N. E. 308. A later decision by this court puts the privilege of organization on a constitutional basis, as has been done in several jurisdictions. "The right of laborers to organize unions and to utilize such organizations by instituting a strike is an exercise of the common-law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. . . . This common-law right was raised to the dignity of a constitutional right by being incorporated in the Constitution of the Commonwealth. . . . In article 1 of the Declaration of Rights it is declared that 'all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of . . . acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.' It is in the exercise of this right that laborers can legally combine together in what are called labor unions." *Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753.

[5] COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501, 618.

[6] These statutes provided that an employer should not "require any employee,

These statutes have been unavailing because they were held to conflict with constitutional provisions.[7] Such discrimination, therefore, still may exist. The desirability of eliminating it will not be discussed, except to point out that the legal privilege to discriminate can be taken away only through constitutional amendment.

Enactments exist in most states to the effect that no one shall interfere by force or violence with the employment of another.[8] This, of course, is merely declaratory of what has always been the law on this matter. Some statutes also expressly forbid threats of injury to property or of bodily harm.[9] The North Dakota statute applies to any one who "maliciously interferes".[10] The legislatures could be of great service, however, by definitely stating what shall be the law on those matters in which the courts are in conflict and in which there is considerable agitation for a change. A familiar example of this is the boycott, which has been expressly declared illegal by statute in several states.[11] Another question which seems far from being settled is whether or not picketing shall be considered legal. Some few statutes expressly prohibit it in any form,[12] while others have declared peaceful picketing to be lawful.[13] It is in matters of this kind that we must look to the legislatures to determine and give expression to public policy and opinion.

---

or any person seeking employment, as a condition of such employment, to enter into any agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association or organization." Act of June 1, 1898 (30 Stat. at L. 428); Calif. Pen. Code, 1903, ch. 16, sec. 679; Colo. Rev. Sts. 1908, ch. 79, secs. 3925, 3926; Conn. Gen. Sts. 1902, ch. 86, sec. 1297; 3 N. Y. Cons. Laws 1909, ch. 48, sec. 531; 2 N. J. Gen. Sts. 1895, 1905.

[7] *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277 (federal statute held to be an invasion of the personal liberty and right of property guaranteed by the 5th Amendment); *Gillespie v. People* (1900) 188 Ill. 176, 58 N. E. 1007; *People v. Marcus* (1906) 185 N. Y. 257, 77 N. E. 1073; see discussion by Richard Olney, *Discrimination against Union Labor—Legal?* (1908) 42 AMER. L. REV. 161.

[8] Mass. Rev. Laws 1902, ch. 106, sec. 11; Ala. Cr. Code 1907, ch. 176, sec. 6397; 3 N. Y. Cons. Laws 1909, ch. 48, sec. 530; *Jones v. Gin Wks.* (1908) 131 Ga. 336, 62 S. E. 236; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *State v. Stockford* (1904) 77 Conn. 227, 58 Atl. 769; Mass. Rev. Laws 1902, ch. 106, sec. 11.

[9] Utah Comp. Laws, 1907, ch. 53, sec. 4487 x 11; Ala. Cr. Code 1907, ch. 211, sec. 6856; *State v. McGee* (1908) 80 Conn. 614, 69 Atl. 1059; *Schultz v. State* (1908) 135 Wis. 644, 114 N. W. 505.

[10] N. D. Pen. Code 1913, ch. 7, sec. 9445.

[11] Hurd's Rev. Sts. Ill. 1919, ch. 38, sec. 46; Ala. Cr. Code, 1907, ch. 176, sec. 6396; Colo. Rev. Sts. 1908, ch. 15, sec. 398; *United States v. Raish* (1908, S. D. Ill.) 163 Fed. 911 (use of mails to boycott).

[12] Ala. Cr. Code, 1907, ch. 176, sec. 6395.

[13] *Heitkemper v. Central Labor Council* (1920, Ore.) 192 Pac. 765. The difficulty involved in statutes of this kind is to determine what constitutes "peaceful picketing." See *Truax v. Corrigan* (1918) 20 Ariz. 7, 176 Pac. 570.

There is one kind of legislation—the anti-trust acts—which has assumed peculiar importance in labor disputes and which in this particular is the object of considerable attack at the present time. These acts were of course originally designed to combat the large combinations of capital, but were so framed as to require the courts to hold that they apply to labor unions as well. Probably the best known of these, and the model for many later state enactments, is the Sherman Anti-Trust Act,[14] which provides that "every contract, combination in "the form of trust or otherwise, or conspiracy, in restraint of trade or "commerce among the several States, or with foreign nations, is hereby "declared to be illegal." The unious have been making a constant fight to have it determined they are not subject to this legislation, and, indeed, hailed the Clayton Act[15] as affording the desired protection. A recent decision of the United States Supreme Court, however, showed this assumption to be erroneous.[16] It is indeed doubtful whether an amendment exempting labor unions or any other special class from the operation of the Act would not be unconstitutional.[17]

Another matter which is in a state of uncertainty at the present time is the extent to which the use of writs of injunction shall be allowed in labor disputes. There seems to be a determined effort to limit such use.[18] Several states have enacted legislation to restrict "government "by injunction," and it was also commonly believed that the Clayton Act was designed to accomplish this purpose. Such legislation, however, has not effectually prevented the courts from continuing to grant injunctions, and this evil, if it is one, still exists.[19] Obviously this

[14] July 2, 1890 (26 Stat. at L. 209). This was held to apply to labor unions in the case of *Loewe v. Lawlor* (1908) 208 U. S. 274, 28 Sup. Ct. 301, aff. in (1915) 235 U. S. 522, 35 Sup. Ct. 170. A collection of the state statutes is to be found in Cooke, *Combinations, Monopolies and Labor Unions* (2d ed. 1909) 384 ff. See *Reihing v. Local Union* (1920, N. J.) 109 Atl. 367; *Webb v. Cooks' Union* (1918, Tex.) 205 S. W. 465.

[15] Oct. 15, 1914 (38 Stat. at L. 730). A recent statute in Wisconsin expressly states that labor organizations shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws. The labor of a human being is not a commodity or article of commerce." Wis. Laws 1919, ch. 211.

[16] *Duplex Printing Co. v. Deering* (1921) 41 Sup. Ct. 172.

[17] *Niagara Fire Ins. Co. v. Cornell* (1901, D. Neb.) 110 Fed. 816 (Nebraska statute held to be unconstitutional); cf. *Rohlf v. Kasemeier* (1908) 140 Iowa, 182, 118 N. W. 276; *People v. Butler Foundry* (1903) 201 Ill. 236, 66 N. E. 349.

[18] Wash. Laws, 1919, ch. 185; Ore. Laws, 1919, ch. 346, applied in *Greenfield v. Central Labor Council* (1920, Ore.) 192 Pac. 783.

[19] In *Goldberg v. Stablemen's Union* (1906) 149 Calif. 429, 86 Pac. 806, the court said: "The section of an act of the legislature there referred to, is somewhat difficult of construction; but, in the first place, it cannot, in our opinion, be construed as undertaking to prohibit a court from enjoining the main wrongful acts charged in the complaint in this action; and, in the second place, if it could be so construed, it would to that extent be void because violative of plaintiff's constitutional right to acquire, possess, enjoy and protect property." It is interesting to note how well this fits in with the Massachusetts idea, when

question is far from settled, and a prediction as to its solution would be futile.

Probably the labor legislation of greatest interest in the United States today is the Kansas Industrial Court Act. This marks a departure from the customary field of legislation in this country, and the result is being observed with great interest. Kansas has been the first state of the Union to take advantage of the experiments in compulsory arbitration in New Zealand and other countries and to make a real attempt to take control of the situation when there is industrial unrest. The extent of our legislation before this has been to provide boards of mediation and conciliation, etc., their duty being to investigate labor disputes and to attempt to bring about industrial peace by arbitration wherever possible.[20] No comment seems necessary on the results obtained by these boards, other than to point out that it is well realized that in our system of law these expedients have not met the situation, and that, despite such boards of conciliation, a strike, as such, is today more or less uncontrolled by law. It is hoped that the Kansas Act may point the way to that much talked of ideal, industrial peace.[21]

Very little mention has been made thus far in these comments of the English law governing trade disputes, the discussion having been intentionally confined as far as possible to the American decisions. Undoubtedly, of course, several well-known English cases[22] have exerted a great influence on American decisions and have become almost classics on this subject. The law as to labor disputes in England is now generally governed by the Conspiracy and Protection of Property

---

ordinarily these two courts are quite divergent in their interpretation of labor law. In *Bogni v. Perotti* (1916) 224 Mass. 152, 112 N. E. 853 it was stated that "the right to work, therefore, is property. One cannot be deprived of it by simple mandate of the Legislature. It is protected by the Fourteenth Amendment to the Constitution of the United States and by numerous guaranties of our Constitution. It is as much property as the more obvious forms of goods and merchandise, stocks and bonds. That it may be also a part of the liberty of the citizen does not affect its character as property." But see dissenting opinion of Bennett, J., in *Heitkemper v. Central Labor Council, supra* note 13. See NOTES (1917) 1 MINN. L. REV. 71. For a discussion of the Duplex Printing Co. case, *supra* note 15, see (1921) 19 MICH. L. REV. 628; see also *Buyer v. Guillan* (Feb. 2, 1921) U. S. C. C. A. 2d, Oct. Term, 1920, No. 154; *Monday Co. v. Automobile Local* (1920, Wis.) 177 N. W. 867. For a different conception of the constitutional guaranties and the "right to work," see Pound, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL, 454.

[20] Conn. Gen. Sts. 1902, ch. 273, secs. 4708-13; Hurd's Rev. Sts. Ill., 1905, ch. 10; Mass. Rev. Laws, 1902, ch. 106 (amended by Acts of 1904, chs. 313, 399); Minn. Gen. Sts. 1913, ch. 23, sec. 3940; 3 N. Y. Cons. Laws, 1909, ch. 36, secs. 140-8; Pa. Laws, 1913, ch. 267; Wis. Laws, 1911, ch. 485. A collection of these statutes may be found in 7 Labatt, *Master and Servant* (1913) 8587-8601.

[21] Young, *Industrial Courts; with Special References to the Kansas Experiment* (1920) 4 MINN. L. REV. 483, (1920-21) 5 MINN. L. REV. 39, 185, 353; Vance, *The Kansas Court of Industrial Relations* (1921) 30 YALE LAW JOURNAL, 456.

[22] *Lumley v. Gye* (1853, Q. B.) 2 Ell. & Black. 216; *Allen v. Flood* [1898, H. L.] A. C. 1; *Quinn v. Leathem* [1901, H. L.] A. C. 495.

Act, 1875,[23] and the Trades Disputes Act, 1906.[24] It seems that, as in America, the determining factor as to the legality of a strike is that of a justifiable object.[25] Naturally the English law also adopts the sound policy that any resort to violence or force is illegal.[26] Union workmen may lawfully refuse to work with a non-union workman, and thus enforce the closed shop.[27] Picketing if peaceful is permissible, by statute.[28] Thus, in general, the English law has adopted principles fundamentally in accord with the rules established in this country, and, indeed, is more consistent with such rules than the decisions of some of our own courts. Due to the provisions of the Trades Disputes Act, however, the English courts are disposed to be more liberal with the labor unions, and the doctrine of justification is extended further than in the United States.

Practically all the remaining parts of the English-speaking world have some form of compulsory arbitration of labor disputes. Thus Canada, Australia, and New Zealand have arbitration laws which have been in operation for several years and which may lead to an adjustment of all industrial disputes on a rational basis.[29] Truly they are experiments of great interest to the rest of the world and ones which at least recognize the fact that the state must be supreme in matters of this kind and that industrial warfare is a thing to be outlawed. It

---

[23] 38 & 39 Vict. c. 86.

[24] 6 Edw. VII, c. 47.

[25] "The legality of using threats in the interest of its members by a trade union had been repeatedly considered. The authorities showed that the question was in each case whether what the defendants threatened to do was an actionable wrong. Had they a just cause or a reasonable excuse for doing what they did? He came to the conclusion that what the defendants here had done was done with a bona fide desire to further the interests of their members. If so, they had taken no unlawful means to carry out what was a perfectly legitimate object." *Wake v. Motor Trade Association* (1920, C. A.) 65 SOL. JOUR. 239.

[26] "He must prove that in order to procure their object they have resorted to threats, coercion, or other illegal means. Inducement not to continue an employment is illegal only if it is exercised by the use of illegal means . . . Can a simple notification to the employer of an intention to do a lawful act or lawful acts, whether it be a notification on behalf of an individual or on behalf of a number of persons, properly be described as the use of illegal means against the plaintiff? I do not think it can." *Wolstenholme v. Ariss* [1920] 2 Ch. 403. One of the provisions of the Trades Disputes Act (sec. 3) is to the effect that interference by a union with a contract of service shall not be actionable.

[27] *Wolstenholme v. Ariss, supra* note 26; *Hodges v. Webb* [1920] 2 Ch. 70; *White v. Riley* [1921] 1 Ch. 1.

[28] "This statute [Trades Disputes Act] might well be termed a codification of the law relating to peaceful picketing as laid down by a majority of the American courts."—Martin, *Modern Law of Labor Unions* (1910) 241.

[29] For the Canadian, Australian, New Zealand, arbitration laws, see 7 Labatt, *op. cit.*, 8601-8621. See also Riddell, *Labor Legislation in Canada* (1920-21) 5 MINN. L. REV. 83, 243; Higgins, *A New Province for Law and Order* (1915) 29 HARV. L. REV. 13, (1918) 32 *id.* 189, (1920) 34 *id.* 105.

is also interesting to note that Denmark has recently enacted somewhat similar legislation.[30] It has established a system of independent courts to deal with labor disputes, but, curiously enough, left the selection of judges to private organizations. This is certainly a departure from the usual course of procedure, involving as it does the court of highest instance within a particular field.

It is evident that the courts have been unable to bring about industrial peace in this country. There is some possibility that labor and capital will settle their differences without requiring outside intervention. The prevalent view, however, appears to be that the remedy must come through the legislatures. Probably the natural course for them to take will be in the direction of compulsory arbitration. The Kansas experiment may be the entering wedge, or it may show the impracticability of such a course.[31] There undoubtedly is a solution to this problem, and it is to be hoped that the legislatures will make a serious effort to discover it. Certainly it would be a sinister confession of weakness if a democracy were to admit that it could devise no means to control and put an end to private warfare between two such large groups of its citizens.

JUDGMENT OR SATISFACTION AS PASSING TITLE

"The controversy whether the title to a converted chattel vests in a defendant by simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result."[1]

Such was the conclusion of Ames on the mooted question whether, in an action for conversion, the mere entry of a judgment for the value of the converted chattel, or the payment of the judgment, passed the title of the chattel to the converter. The early cases stated that title passed by the judgment.[2] It has long been the fashion, however, to say that, not the judgment, but only satisfaction of it passes the

---

[30] *The Danish Labor Court:* (Dec. 9, 1920) Industrial Information Service 3-6.

[31] This and other measures will be taken up in a further comment.

[1] Ames, *The Nature of Ownership* (1890) 3 HARV. L. REV. 23, 313, 327, 3 *Select Essays in Anglo-American Legal History* (19..) 561, 578, *Lectures in Legal History* (1913) 209.

[2] *Adams v. Broughton* (1708, K. B.) 2 Strange, 1077; *Smith v. Gibson* (1737, K. B.) 1 Cas. T. Hardw. 319; *Brown v. Wotton,* (1606, K. B.) Cro. Jac. 73, Yelv. 67, Moore, 762; *Bishop v. Montague,* (1601, C. P.) Cro. Eliz. 824. See also *Buckland v. Johnson* (1854, C. P.) 15 C. B. 145; *Cooper v. Shepherd* (1846, C. P.) 3 C. B. 265; note to *Bennett v. Brandao* (1843, C. P.) 6 Man. & Grang. 630, 640; *Kitchen v. Campbell* (1772, C. P.) 3 Wils. 304, 309, 2 Wm. Black. 779, 827; see also discussion of the earlier cases in *Brinsmead v. Harrison* (1871) L. R. 6 C. P. 584, (1872) L. R. 7 C. P. 547. For cases in the Year Books see note 5, *infra,* and cf. Keil. 58b.

title.[3] Thus the court in *Decker v. Milwaukee Cold Storage Co.* (1920, Wis.) 180 N. W. 256, states that, by the "great weight of authority", it is only the satisfaction of the judgment which, by law, divests the original owner of his title. Much of the difficulty and much, though not all, of the conflict in the cases comes from the use of the uncertain and indefinite term "title" to express varying legal situations for which a closer definition is desirable. "Title" is a concept of much agility. Generally, when it appears, we find in it a tendency to flit here and there with a suddenness which is surprising, and hence we should not be surprised to find it possessing these characteristics in the situation under discussion.[4] The confusion comes from the fact that title is applied to an aggregate—a "bundle"—of legal relations, and we find the term used indiscriminately to indicate a bundle of various sizes.

Thus, if the term means the passing of all legal interest in the chattel from the original owner, title does not pass until satisfaction of the judgment; if, however, it means the passing of *some* interest from the owner, it passes at least on judgment, if not before.[5] Although Ames adhered to the traditional term "title", he had this distinction clearly in mind in the passage quoted above, where he suggests that some

[3] *Brinsmead v. Harrison, supra* note 2; *Atwater v. Tupper* (1877) 45 Conn. 144; *Miller v. Hyde* (1894) 161 Mass. 472, 37 N. E. 760; *Tolman Co. v. Waite* (1899) 199 Mich. 341, 78 N. W. 124; *Russell v. McCall* (1894) 141 N. Y. 437, 36 N. E. 498; see also 2 Kent, *Commentaries*, *388. See cases collected in 15 Ann. Cas. 454, note, 26 R. C. L. 1157, 38 Cyc. 2112. In 38 Cyc. 2112, many cases are cited as holding in accord with the old rule. Most of them may be distinguished as pointed out in this comment. In accord with the former rule, however, see *Hyde v. Kiehl* (1898) 183 Pa. 414, 38 Atl. 998; *Merrick's Estate* (1842, Pa.) 5 W. & S. 9, 17; *Wilburn v. Bogan* (1842, S. C.) 1 Spear, 179; *Murrell v. Johnson's Administrator* (1807, Va.) 1 H. & M. 449; and cf. *Parmenter v. Barstow* (1899) 21 R. I. 410, 43 Atl. 1035.

[4] See Corbin, *What is a Transfer of Title* (1920) 29 YALE LAW JOURNAL, 429; also, as to the somewhat similar term "own," cf. Cook, *Hohfeld's Contribution to the Law* (1919) 28 *id.* 721, 725.

[5] The language of the cases in the Year Books on election of remedies—"disseisin by election"—indicates that the election to divest the property out of oneself was made by the bringing of the action. (1440) Y. B. 19 Hen. VI, p. 65, pl. 5; (1462) Y. B. 2 Edw. IV, p. 16, pl. 8; (1405) Y. B. 6 Hen. VII, p. 8, pl. 4. Compare as to realty, Co. Lit. 323 b, and see Holmes, J., dissenting, in *Miller v. Hyde, supra* note 3; see also Bordwell, *Property in the Trespasser* (1916) 29 HARV. L. REV. 374, 385. This was the view of Anderson and Warburton, JJ., in *Bishop v. Montague, supra* note 2; cf. cases in note 2, *supra*. Yet since a nonsuit was and is so freely permitted and is no bar in another suit the question should not be of importance. See Co. Lit. 139 a; *Outhwaite v. Hudson* (1852) 7 Exch. 380; Bacon Abr. tit., Non-Suit: 18 C. J. 1153, 1171. As Holmes says, in *Miller v. Hyde, supra* note 3, "An election is determined by judgment." There are, however, cases holding that the election is finally and conclusively made by the bringing of the suit. *Ireland v. Waymire* (1920, Kan.) 191 Pac. 304, criticised in (1920) 30 YALE LAW JOURNAL, 206, citing Keener, *Quasi-Contracts* (1893) 203-213; Corbin, *Waiver of Tort* (1910) 19 YALE LAW JOURNAL, 221, 239; (1919) 28 *id.* 409. In *Brown v. Wootton, supra* note 2, the court treated the judgment rather as *res judicata* than as an election.

interest passes on judgment and the rest on satisfaction. In fact, he gives a new twist to the term, showing it to be a variable thing, while the usual fallacy is to use it in the belief that it means a fixed and certain thing. The real issue therefore is, to ascertain just how much of a legal interest passed from owner to converter at each stage of the proceedings.

Even by the conversion the converter has bettered his legal position somewhat with respect to the chattel, for, by the more general rule, he gets "title as against all the world except the true owner" and those claiming under the true owner, i.e., he may sue or defend on the strength of his possession.[6] But since disseisin of chattels does not carry as important results from the standpoint of remedial relief as did the old disseisin of realty,[7] the converter has acquired as against the true owner little more than a liability to a judgment of some kind. Suppose such judgment to be entered. If it is for the redelivery of the chattel, obviously "title" has not passed, that is, the converter has acquired no further legal interest in the chattel. If it is for the value of the chattel, has a further legal interest been acquired? In one respect at least, there has, since a former judgment may be pleaded under the doctrine that no one is to be sued twice for the same wrong. After a judgment for the value of the chattel, the original owner can no longer sue the converter for the chattel itself or for its value. Trespass, trover, implied assumpsit, detinue, and, it seems, replevin, or their descendants under the codes, all are barred by the judgment in trover.[8] The converter is immune from suit and thus has approached complete ownership. What does he lack?

Before attempting an answer to this question, it may be well to state

[6] By the weight of authority title in a third party is not a defense to an action for conversion, unless the defendant connects himself with such title. See cases collected, 38 Cyc. 2062; 26 R. C. L. 1141.

[7] See Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, 604, 609; and see also articles by Bordwell, *supra* note 5, and Ames, *supra* note 1.

[8] *Nemo bis vexari debet pro eadem causa. Kitchen v. Campbell, supra* note 2; *Smith v. Gibson, supra* note 2; *Ferrer's Case* (1598, C. P.) Coke, Pt. 6, 7a; *Singer & Co. v. Yaduski* (1902) 11 Pa. Dist. Rep. 571; *Rembert v. Hally* (1850, Tenn.) 10 Humph. 513; *Lacon v. Barnard* (1627, C. P.) Cro. Car. 35; *Wooley v. Carter* (1823, N. J. L.) 2 Halst. 45; *Lovejoy v. Wallace* (1865, U. S.) 3 Wall. 1, 19; *Rauer v. Rynd* (1915) 27 Calif. App. 556, 150 Pac. 780; *Mead v. Mead* (1911) 115 Minn. 524, 132 N. W. 1132; *Smith v. Clark* (1909) 37 Utah, 116, 106 Pac. 653, 26 L. R. A. (N. S.) 281, note; *Oliver v. Grand Ronde Grain Co.* (1914) 72 Ore. 46, 142 Pac. 541. See cases collected 23 Cyc. 1321. The judgment must of course be for the value of the chattel and not merely damages for the taking, i. e., the issue must be the same. *Lacon v. Barnard, supra.* It might be thought that the unpaid plaintiff should still have replevin. While the authority is scanty, this does not seem to be true. Cf. *Rauer v. Rynd, supra; Mead v. Mead, supra.* And if it were, we should have this dilemma, that the plaintiff would be entitled to possession notwithstanding the judgment in trover, and if defendant refused to give up possession on demand he would be guilty of conversion and then trover would again lie!

another point as to which the courts are coming more and more into general agreement: It is a general principle of the law of torts that a judgment against one of two joint tort-feasors is no bar to a suit against the other until the judgment is satisfied.[9] Unlike the rule against double vexation, there is no socially desirable principle that a man should be relieved of his tort by the mere entry of a judgment, which has not been paid, against another. So, in accord with this principle, we find many cases allowing successive suits against joint converters or against successive converters brought before the first judgment for the value of the chattel.[10] In fact almost all of the cases involve this point, and, while the rule of law will be stated broadly that satisfaction is necessary to the passing of title, actually it will be only a case of a joint wrong or of a conversion from the converter.[11] Such was the actual decision in *Decker v. Milwaukee Cold Storage Co., supra*, where a factor had wrongfully transferred the plaintiff's goods to the cold storage company. It was held that an unsatisfied judgment for conversion against the factor did not bar replevin by the owners against the storage company. Each case it cites to show the "great weight of authority" presents only an analogous situation and not a case where one is claiming by transfer from the judgment debtor after the judgment.

Hence we see that joint or successive converters may be sued until satisfaction is obtained, while the mere entry of judgment gives an immunity from suit to the defendant converter who is sued. What is the position of those who take from the converter after judgment? Ames suggested acutely,[12] and his suggestion has been adopted by learned commentators,[13] that the answer to this question should depend upon who has possession at the time of the judgment. If the converter has possession at the time of the judgment, "the converter's possession, "being thus set free from adverse claims, changes into ownership," and subsequent possessors are protected; whereas, if there is a change of possession before judgment against the converter, the new possessor

[9] That judgment against one of two joint tort-feasors without satisfaction is no bar to a suit against the other—the usual rule in America—see *Livingston v. Bishop* (1806, N. Y. Sup. Ct.) 1 Johns. 290; *Litchfield v. Goodnow* (1887) 123 U. S. 549, 8 Sup. Ct. 210; *Lumber Co. v. Banks* (1907) 118 Tenn. 627, 102 S. W. 79; but see *contra, Petticolas v. Richmond* (1897) 95 Va. 456, 28 S. E. 566; and *Brinsmead v. Harrison, supra* note 2, (criticised by Ames, *op. cit.* note 1). For cases collected see 23 Cyc. 1212.

[10] Such were the cases in note 3 *supra*. Thus in *Miller v. Hyde* there were successive conversions, and in *Atwater v. Tupper* there was a joint conversion. See also *Matthews v. Menedger* (1840, C. C. 7th) 2 McLean, 145; *Sharp v. Gray* (1844, Ky.) 5 B. Mon. 4; *Hopkins v. Hersey* (1841) 20 Me. 449; *McGee v. Overley* (1851), 12 Ark. 164; *Dow v. King* (1889) 52 Ark. 282, 12 S. W. 577; *Singer Mfg. Co. v. Skillman* (1890) 52 N. J. L. 263, 19 Atl. 260.

[11] Cf. cases in notes 3 and 10 *supra*.

[12] Ames, *op. cit.*, note 1.

[13] See NOTES (1902) 16 HARV. L. REV. 131.

is not so protected. On the surface at least there seems to be no logical sequence from cause to result. Is it, as Ames suggests, analogous to the running of the statute of limitations where "possession ripens into "ownership?" There is a certain analogy, it is true, but it is believed that the reason for the rule suggested by Ames goes deeper. It is simply an application of the rule against double vexation to allow the taker from the judgment debtor to be in as good a position as the debtor is and to have a like immunity from suit. Hence under this view neither the converter nor those claiming under him after the judgment, i. e., in privity with him, may be sued.[14] But suit may be brought against all others not occupying this favored position.[15] Or, as is so often expressed, judgments bind parties thereto and their privies, and as those claiming under the converter after the judgment are in privity with him, the judgment is binding upon them and in their favor.[16]

Our sympathies for the unpaid plaintiff may lead us to object to this view, but it is thought that from the standpoint of reason and justice there is much to be said for it. If the converter finds that his judgment does not enable him to sell the chattel with any degree of safety, his immunity from another suit is of indifferent value. This may not cause us discomfort, since with an unsatisfied judgment against him he is not in a position to make any particular appeal to our sympathies. And the rule against double vexation is probably only partly for his protection, for the courts themselves need some protection and this is a device to prevent litigation from lasting forever.[17] But the position of the taker from the converter is more appealing. Acting subsequent to a judgment for the value of the chattel, and quite probably upon

[14] For good discussion see *Barb v. Fish* (1847, Ind.) 8 Blackf. 481, 485; see also (1844) 3 AMER. L. MAG. 49, *infra* note 18. A creditor of the converter may take the chattel on execution against the converter. *Rogers v. Moore* (1838, S. C.) Rice, 60; *Norrill v. Corley* (1828, S. C.) 2 Rich. Eq. 288; *Forman v. Nielson* (1846, S. C.) 2 Rich. Eq. 387; *Norris v. Beckley* (1818, S. C.) 2 Const. Rep. 228; but cf. *Bush v. Bush* (1847, S. C.) 1 Strob. Eq. 377. In *Eckert v. Truman* (1914). 163 App. Div. 17, 148 N. Y. Supp. 48, it was said that while satisfaction of a judgment for conversion was necessary for the passage of title, "still the act of suing for conversion did change plaintiff's position," and he was no longer entitled to possession of the chattel. Hence the converter and her son to whom she claimed to have sold the chattel were not guilty of contempt of court in refusing to deliver it over to the plaintiff. For a somewhat similar situation, see *Deitz v. Field* (1896) 10 App. Div. 425, 41 N. Y. Supp. 1087; but see *Union Pac. Ry. v. Schiff* (1897, S. D. N. Y.) 78 Fed. 216, (1898, C. C. A. 2d) 86 Fed. 1023.

[15] As above noted, the usual case is that of the joint wrong-doer. See notes 3, 10, and 11 *supra*. As to those who take from or dispossess the converter prior to judgment, see *Morris v. Robinson* (1824, K. B.) 3 Barn. & Cres. 196.

[16] *Lovejoy v. Murray* (1865, U. S.) 3 Wall. 1, 18; *Litchfield v. Goodnow, supra* note 9; 23 Cyc. 1227, 1253, 1259.

[17] See remarks in *Ferrer's Case, Kitchen v. Campbell,* and the other cases cited in note 8 *supra,* especially *Lovejoy v. Murray, supra* note 16, at p. 19.

faith of it, he surely is more deserving of protection than the man who has had his election of remedies and has taken his choice, who has chosen to pursue that course which he thought would bring him the most advantage, and who, moreover, has had the opportunity of enforcing his judgment by levying execution on the chattel itself while it was in the converter's hands. There is some support for this view in the cases, but there are few direct precedents on the point and they are not harmonious. Some of the cases cited by Ames fail to support his position. The issue is obscured by the general statement that "title" passes at one time or another.[18] But the cases which do not afford protection by the judgment to those claiming under the judgment debtor surely reach an anomalous result, for the converter—perhaps an intentional and malicious wrong-doer—is no longer subject to a suit, while his innocent victims are. Some way should be sought in the event of such a holding, to avoid the ruling that the initial converter cannot again be sued. Perhaps it might be said that the action resulting in the judgment put in issue the title but not the immediate right to possession, which could be sued upon in a subsequent action of replevin. Yet this seems unsound, for the action does put in issue also the question of possession.[19] Ames' view that one claiming under the judgment debtor by a transfer after judgment is protected would appear to be the sounder. Moreover, it avoids another anomaly, that of shielding the hardened converter who knows the law, for he will either not attempt to sell the chattel concerned in the judgment or will pick his victim with care before he vanishes. Any unexpected rule of law—any rule opposed to ordinary business practice—puts him who has had experience with it and knowledge of it at an advantage over

[18] Only in *Barb v. Fish, supra* note 14, does there seem to be an appreciation of the point that title included many legal relations, not all of which change at any one time. Ames' position is in general supported by the cases cited in note 14, though some of them speak of the judgment as passing title, i. e., the old common-law rule. As *contra,* should probably be stated cases where it is said that satisfaction is necessary, and no point is made whether the defendant claims under and subsequent to the former judgment or not. *Ledbetter v. Embree* (1895) 12 Ind. App. 617, 40 N. E. 920; *Spivey v. Morris* (1856) 18 Ala. 254; *Osterhout v. Roberts* (1827, N. Y. Sup. Ct.) 8 Cow. 43; *Goff v. Craven* (1884, N. Y. Sup. Ct.) 34 Hun, 150 (see criticism by Ames, *op. cit.* note 1). In *Spivey v. Morris* and *Osterhout v. Roberts,* however, the defendant did not show himself in privity with the judgment debtor after the judgment and hence the cases are merely similar to those in notes 3 and 10 *supra.* In an interesting article, *Transfer of Personal Property by Judgment* (1844) 3 AMER. L. MAG. 49 the conclusion is reached "that a judgment in trespass or trover without satisfaction will not transfer the title to the defendant, though such judgment is pleadable in bar to any action by the same plaintiff and his privies, against the same defendant and his privies."

[19] See note 8, *supra.* The crux of the matter is here, for surely we should not wish to treat the converter more gently than his transferee. Those who would favor the unpaid plaintiff should attack, therefore, the whole rule of the binding force of former judgments.

the ordinary innocent law-abiding citizen, and this is thought to be such a rule.[20]

Should the converter secure from the judgment also an immunity from self-help, i. e., from a retaking of the chattel by the owner? An English case held that the owner might himself retake his chattel from the converter in spite of a judgment for its value in his favor.[21] This does not conflict with our rules of policy suggested above, but it may be questioned how far, in view of the desirability of avoiding free fights, self-help should be available when court aid is not. It has been held in New Hampshire that a retaking by the owner after judgment but before satisfaction makes the owner liable in trover to the converter after the latter has paid the judgment.[22] This result seems preferable, though it is placed on the fiction—unnecessary under Ames' reasoning—of "title relating back" to the conversion or the judgment when satisfaction is at length made.[23]

Decker v. Milwaukee Cold Storage Co., therefore, states only the ordinary rule applicable to joint or successive converters. To explain the decision in terms of the passage of title does not solve more difficult questions with which the court may be confronted in the future. It may then be desirable to point out that, while joint or successive wrongdoers are not protected by a bare judgment against one of their number, yet such a judgment will be protection both to those who are parties to it and to those who claim under parties to it.

C. E. C.

CRIMINAL RESPONSIBILITY OF PARENT WHO REFUSES TO OBTAIN MEDICAL TREATMENT FOR SICK CHILD

The increasing number of persons whose religious belief discountenances the use of medicine in the treatment of disease gives considerable importance to the interesting legal questions which arise when a parent, because of religious conviction, fails to provide medical attention for his sick child. Two fairly recent cases have expressed opposite views

[20] It might be claimed that only those who *purchase* from the judgment debtor should be entitled to the protection of his judgment. It is thought, however, that the reasons suggested in the text are strong enough to justify protection for any kind of a taker from the converter after a judgment against the latter. Only then can the converter's immunity from further suit—except on the judgment debt—be made practically complete and effective.

[21] *Ex parte Drake* (1877) L. R. 5 Ch. Div. 866.

[22] *Smith v. Smith* (1872) 51 N. H. 571; cf. *Greer v. Lafayette County Bank* (1898, Tex. Civ. App.) 47 S. W. 737; *Acheson v. Miller* (1853) 2 Oh. St. 203.

[23] The same rule applies to increase of the chattel prior to satisfaction. *Hepburn v. Sewell* (1821, Md.) 5 H. & J. 211; *White v. Martin* (1834, Ala.) 1 Port. 215. The doctrine of relation is criticised by Holmes in *Miller v. Hyde, supra* note 3, and by Ames, *op. cit.* note 1. In *Bacon v. Kummel* (1866) 14 Mich. 201, it was held not to apply so as to make an otherwise rightful act a trespass. Cf. *Third Nat'l Bank v. Rice* (1908, C. C. A. 8th) 161 Fed. 822, 15 Ann. Cas. 450, note.

of the parent's criminal responsibility in case such lack of treatment results in the child's death.

In *Bradley v. State* (1920, Fla.) 84 So. 677, it appeared that the defendant's daughter, under sixteen years of age, in an epileptic paroxysm fell unconscious into a fire and was severely burned. The defendant believed in divine healing by prayer and refused to summon or to permit others to summon a physician to attend the child, although according to the testimony of a witness who saw her two weeks after the accident she was suffering intensely. After remaining more than four weeks at the defendant's home without other treatment than prayer, the child was sent to the State Hospital for the Insane, where she received treatment from physicians. Three weeks later she died. The physicians testified that her death resulted from the burn and that in their opinion she would have recovered if she had received medical attention promptly after the accident. The father was convicted of manslaughter under a statute which defined this crime as "the killing "of a human being by the act, procurement or culpable negligence of "another." This conviction was reversed by a divided court, the majority opinion stating that "the general definition of manslaughter con-"tained in the statute does not appear to cover a case of this nature."[1]

On the other hand, in *State v. Barnes* (1919) 141 Tenn. 469, 212 S. W. 100, where the defendant was indicted for wilfully and without good cause failing to provide for his minor child by suffering the child to sicken and die without proper care and medical attention, the court said:

"It is the legal duty of the father to provide 'proper care, treatment 'and medical attention' for his child. . . . If by reason of his breach of this duty the death of this child resulted, we think the father may be guilty of homicide."

Before proceeding to discuss the main problem, namely, whether failure to procure medical treatment in case of serious illness can be deemed "culpable negligence" on the part of the parent, it may be well to dispose of the preliminary question of the causal connection between such failure and the subsequent death of the child. It is elementary that if a person is to be held criminally responsible for the death of another, his act or failure to act must have caused, or at least have

[1] The court apparently relied also upon supposed lack of causal connection between the father's conduct and the death of the child. Whitfield, J. at p. 679: "Manifestly the death of the child was caused by the accidental burning in which the father had no part. The attentions of a physician may [might] or may [might] not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause 'the killing' of the child, even if the failure or refusal of the father to provide medical attention was 'culpable negligence' within the intent of the statute."

Here the court invaded the province of the jury, it would seem. If the parent's conduct was culpable negligence, then the question whether such negligence caused the death is one of fact for the jury. See *infra*, notes 3 and 5.

accelerated, the death of such other.[2] Is medical science sufficiently exact so that it is possible to prove beyond a reasonable doubt that medical treatment would have saved or prolonged the life of the deceased, or, in other words, that failure to provide it caused or accelerated the death? Browne, C. J., in the Florida case believes that this question must be answered in the negative.[3] While it is not sufficient for physicians to testify merely that the sick person's life *might probably* have been prolonged by medical treatment,[4] positive expert opinion that his life *would* have been prolonged is accepted by the overwhelming weight of authority as competent evidence to sustain a jury's verdict that lack of such treatment did in fact cause or accelerate the death.[5] Expert medical testimony that a blow or a poison caused death in a given case is accepted without question; yet such testimony is only a conclusion of the witness based upon experience of what usually happens under similar circumstances. A competent physician's opinion that a given disease or a burn would have been cured by certain medical treatment, because experience in a large number of similar cases has shown that such cures have been effected, is no less credible and convincing to a great majority of the community, even though there be a considerable number who disbelieve in the efficacy of medicine.

Assuming, then, that competent evidence convinces the jury that medical treatment would have saved or prolonged the child's life, the problem remains whether a parent who fails to supply it because of an honest disbelief in its efficacy, should be held guilty of manslaughter. That "criminal negligence" may take the place of evil intent and supply the *mens rea* commonly said to be necessary to establish guilt of manslaughter needs no argument.[6] The precise question, therefore, is

---

[2] *Reg. v. Morby* (1882) 15 Cox C. C. 35; *Rex v. Instan* [1893] 1 Q. B. 450; *State v. Lowe* (1896) 66 Minn. 296, 68 N. W. 1094; *Commonwealth v. Hoffman* (1903) 29 Pa. Co. Ct. 65, 70.

[3] Browne, C. J., in his concurring opinion says: "The fallacy of this [the state's case] is that it was not proven, and was not capable of being proven, that if the child had had medical attention it would have recovered. And that must always be the fallacy in an attempt to attach the guilt of manslaughter to a father for failing to call a physician whenever his child is sick, if it subsequently dies." See also note 1, *supra*.

It is believed that *Bradley v. State* stands absolutely alone in the assertion that causal connection between the death and the lack of treatment is incapable of legal proof. Compare, note 5, *infra*.

[4] *Reg. v. Morby, supra* note 2.

[5] In *Reg. v. Senior* [1899] 1 Q. B. 283, the judge instructed the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical attention. One of the questions reserved was whether there was evidence upon which the jury could properly convict the prisoner. The conviction was affirmed. See also *Commonwealth v. Hoffman, supra* note 2, and the cases cited in annotations in 6 L. R. A. (N. S.) 685; 45 *id.* 559; 10 A. L. R. 1137.

[6] 1 Bishop, *New Criminal Law* (8th ed. 1892) secs. 313, 314.

whether criminal negligence can exist where the parent acts from the best of motives and, as he honestly believes, in the interest of the child. The answer must depend upon whether the standard of conduct, departure from which may constitute criminal negligence, shall be the defendant's personal standard of reasonable conduct or an objective standard based on what the average prudent citizen would deem reasonable conduct under the circumstances. The objective standard has been universally accepted as the basis of responsibility for negligent torts,[7] but there are conflicting views as to which standard obtains in criminal law.[8] Moral guilt perhaps implies a certain state of consciousness with reference to the consequences of one's acts. But it is not necessarily true that only morally blameworthy acts should be punished criminally. The chief purpose of the criminal law is to induce conformity to certain rules of conduct believed to be for the general good. Consequently the standard of lawful conduct should be an external standard established in the interest of the community. The standard is such that failure to conform is blameworthy in the average member of the community. For the welfare of all, the particular individual may be required to reach that average standard at his peril and may justly be punished for failure to do so, however pure his motives or intentions.[9]

That an objective standard may be imposed by legislation will scarcely be questioned. In numerous jurisdictions the standard of conduct required of a parent in respect to his minor child has been declared by statute; and statutes imposing a duty "to support,"[10] or to supply "necessaries,"[11] or forbidding "wilful neglect" injurious to the child's health[12] have been construed to require the furnishing of necessary medical care and treatment; while in New York the code expressly

---

[7] See Tindal, C. J., in *Vaughan v. Menlove* (1837, C. P.) 3 Bing. N. C. 468, 475: "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

[8] *Commonwealth v. Pierce* (1884) 138 Mass. 165, 176 maintains the objective standard; *State v. Schulz* (1881) 55 Iowa 628, 8 N. W. 469, maintains the individual standard. See also (1899) 12 HARV. L. REV. 428; (1902) 15 *id.* 500; (1920) 6 CORN. L. QUAR. 105.

[9] The most effective exposition of this view has been made by Mr. Justice Holmes in *The Common Law*, chap. II.

[10] *Owens v. State* (1911) 6 Okla. Cr. 110, 116 Pac. 345, Ann. Cas. 1913 B, 1218, note.

[11] *Rex. v. Brooks* (1902) 9 B. C. 13; *Rex v. Lewis* (1903) 6 Ont. L. R. 132; *Commonwealth v. Hoffman, supra* note 2; *Commonwealth v. Breth* (1915) 44 Pa. Co. Ct. 56; and see 10 A. L. R. 1145. note.

Compare *Justice v. State* (1902) 116 Ga. 605, 42 S. E. 1013, holding that "necessary sustenance" does not embrace medical attention.

[12] *Reg. v. Senior, supra* note 5.

declares the parent's duty to supply "medical attendance."[13] Of course such legislative enactments do not contemplate the summoning of a physician for every trifling illness. A reasonable discretion remains vested in the parent, and the standard determining when it is necessary to call in the services of a physician is that of the ordinarily prudent person solicitous for the welfare and recovery of his child.[14] Where such statutes exist and make breach of the duty a misdemeanor, the courts have had no difficulty on familiar principles in holding the parent whose failure to provide medical treatment has caused or hastened the child's death guilty of manslaughter.[15] That the parent has acted from religious conviction that prayer was more efficient than medicine is immaterial, except as a circumstance to mitigate the severity of the sentence to be imposed. Laws cannot interfere with religious beliefs and opinions, but they may with practices. A contrary view "would make the professed doctrines of religious beliefs superior to "the law of the land and in effect permit every citizen to become a law "unto himself."[16] The welfare of the community requires that everyone should submit to quarantine rules and to other health and police regulations, whatever his personal views as to their efficacy or their sanction in religion.

The same reasons which justify imposing by legislation an objective standard of conduct argue persuasively for an objective standard in drawing the line at common law between careful and negligent conduct. On the principle that manslaughter may be committed by the negligent omission to perform a legal duty when such omission endangers life and in fact results in death,[17] a parent able to supply food[18] or shelter[19]

---

[13] *People v. Pierson* (1903) 176 N. Y. 201, 68 N. E. 243. Here the prosecution was for violation of the statute, not for manslaughter, though it would seem that the latter charge might have been maintained.

[14] This is well stated by Haight, J. in *People v. Pierson, supra* note 13, at p. 205. See also *Rex v. Lewis, supra* note 11, at p. 144.

[15] See citations in notes 5, 10, 11 and 12, *supra*.

Section 3238 Fla. Gen. St. 1906, provides that "any person . . . who shall wilfully deprive such child or ward of necessary medical attention, shall be deemed guilty of a misdemeanor. . . ." Why a breach of this statutory duty, resulting in the child's death, should not have been held to constitute manslaughter in *State v. Bradley, supra,* is not apparent. See *State v. Staples* (1914) 126 Minn. 396, 148 N. W. 283.

[16] Waite, C. J., in *Reynolds v. United States* (1878) 98 U. S. 145, 166 (prosecution for polygamy); see also *State v. White* (1886) 64 N. H. 48, 5 Atl. 828 (non-observance of Sunday law); *Commonwealth v. Breth* (1915) *supra* note 11, at p. 59.

[17] Wharton, *Homicide* (3d ed. 1907) 685 *et seq.*

[18] *Reg. v. Bubb* (1851) 4 Cox C. C. 455; *Reg. v. Conde* (1867) 10 Cox C. C. 547; *Rex v. Instan, supra* note 2; *Lewis v. State* (1883) 72 Ga. 164; *State v. Staples, supra* note 15.

[19] See *Territory v. Manton* (1888) 8 Mont. 95, 19 Pac. 387; *Reg. v. Brown* (1893) 1 Terr. L. R. 475, 1 N. W. Terr. Sup. Ct. pt. 4, p. 35.

to his helpless child and neglecting to do so is clearly guilty of this crime if the child's death results. The common-law duty of a parent is generally held to embrace the furnishing of necessary medical care[20] as well as food and shelter. But it may be urged that the two classes of cases are distinguishable because no sane parent can honestly believe food and shelter unnecessary to the preservation of life, while many exemplary citizens do honestly disbelieve in the efficacy of medicine.[21] This difference is immaterial, however, if the objective standard of careful conduct be adopted. If the defendant knows that the child's condition is such that the average prudent and solicitous parent would foresee danger to its life and summon medical aid, but he refuses to do so because of his personal disbelief in medicine, his failure to conform to the objective standard of due care in the performance of his duty as parent should be deemed culpable negligence. It is believed that the weight of the small amount of legal authority which exists favors this conclusion.[22]

The health of the child is of vital interest to the State, no less than to the parent. So long as a majority of the citizens believe in the efficacy of medicine there is no injustice in requiring all parents to conform to the majority standard of careful conduct and in punishing wilful failure to do so which results in the child's death. At present the majority view is that prayer may be added to medical treatment, but not substituted for it in serious illness. When, if ever, those who believe prayer more efficacious than medicine, shall become the majority, then the required standard will change and parental responsibility will be judged on a new basis. That the majority standard will not be abused as an instrument of persecution of the minority is evidenced by the very small number of cases reporting criminal prosecutions in such circumstances.

T. W. S.

---

[20] See authorities cited in the strong dissenting opinion of West, J. in *Bradley v. State, supra,* at p. 681, and in *State v. Barnes, supra.*

[21] See *Reg. v. Wagstaffe* (1868) 10 Cox C. C. 530, 533.

[22] The English cases prior to the enactment of the statute are discussed in *Reg. v. Senior, supra* note 12, Lord Russell saying, at p. 292, "I am not satisfied that in the present case there was not sufficient evidence, at common law, to justify a conviction."

In *Rex v. Brooks, supra* note 11, the count charging breach of the common-law duty was held sufficient, as well as the count based on the statutory duty to provide necessaries.

The American authorities by decision or dictum favor responsibility at common law. *State v. Barnes, supra; Stehr v. State* (1913) 92 Neb. 755, 139 N. W. 676, 45 L. R. A. (N. S.) 559, note; *State v. Staples, supra,* note 15; *Spead v. Tomlinson* (1904) 73 N. H. 46, 59 Atl. 376. *Contra, State v. Sandford* (1905) 99 Me. 441, 59 Atl. 597. It would seem that cases under statutes which are merely declaratory of the parents' common-law duty to supply "necessaries" are also persuasive on the point under discussion. See citations in notes 10 and 11 *supra.*

WHEN A WILL INTENDS AN EQUITABLE CONVERSION

The intention of a testator is a conundrum of such peculiar fascination that the power of creating an ambiguous future interest may be his sole guaranty of earthly immortality; particularly if his estate is subject to one of those eternal controversies between the life tenant and the remainderman. In 1921 we find out from the New York Court of Appeals in *Furniss v. Cruikshank* (Mar. 8) what a testator who died in 1871 meant by his will.[1] William P. Furniss created a trust of unproductive real estate, the income payable to a life beneficiary, with the remainder to others. The will expressed no imperative order of sale and declared that " all powers herein given are intended to be discretionary, and to be exercised or not as the executors and trustees "should think proper." The trust fund for the life tenant was set up in 1874, and the unproductive real estate was sold in separate lots between 1885 and 1902. The plaintiffs, claiming under the now deceased life tenant, sued the trustees for income computed as if the land had been sold in 1875. Reversing the decisions of the Special Term and the Appellate Division, the New York Court of Appeals decided that Furniss intended the proceeds, when realized, to be apportioned between income, payable from the time of his death to the life beneficiary, and principal belonging to the remainderman. By taking all of the circumstances into account, an equitable conversion was found to have been intended, and the discretion conferred upon the trustees applied only to the time of a sale, which itself was imperative.

The case is an interesting example of the tendency to favor the immediate beneficiary. The crux of the question is whether an imperative order of sale was intended, for without it, no equitable conversion is possible.[2] To find a command to sell from surrounding circumstances in the face of an expressed discretionary power places New York in a unique position on the question.[3] No court has gone as

[1] Not yet reported. For the opinions below see (1920) 191 App. Div. 450, 181 N. Y. Supp. 522; (1915, Sup. Ct.) 90 Misc. 138, 154 N. Y. Supp. 272.

[2] See cases collected in 20 L. R. A. (N. S.) 65, note; 6 R. C. L. 1075; *Yates v. Yates* (1860, Ch.) 28 Beav. 637; *In re Cooper's Estate* (1903) 206 Pa. 628, 56 Atl. 67. Where the general scheme of a will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion. *Ford v. Ford* (1887) 70 Wis. 19, 33 N. W. 188; see 7 Eng. Rul. Cas. 24, 25.

[3] The instant case relies upon *Spencer v. Spencer* (1916) 219 N. Y. 459, 114 N. E. 849, where a trust fund was created with full power to the trustees to sell "in their discretion, and at such prices . . . as they may deem proper." The immediate precedent for *Spencer v. Spencer* was *Lawrence v. Littlefield* (1915) 215 N. Y. 561, 109 N. E. 611, where there was an "imperative power of sale and an equitable conversion of the real estate into personalty at the death of the testator." The actual will is not given. *Edwards v. Edwards* (1903) 183 Mass. 581, 67 N. E. 658, is the most nearly analogous decision in any other jurisdiction, but the will contained no general discretionary clause and the court said: "It was the duty of the trustees to convert this property into an income-producing fund." *Spencer v. Spencer, supra,* apparently marks the point at which New York

far in liberality of interpretation. But once an imperative order of sale is found, the principle of the decision is clear. Where a testator gives property to trustees with an absolute trust for conversion and a discretion as to the time at which the conversion shall take place, a delay at the instance of the trustees should not prejudice the rights of the life tenant; he should have the same benefit as if the conversion had occurred within a reasonable time after the death of the testator,[4] a period usually fixed at twelve months.[5] Why should the life tenant, the child of the testator, the immediate object of his bounty, fast during lean years so that remaindermen may feast in the remote future? The result is one which every court would desire to reach, but which it is believed few would have reached in the instant case.

How far does that vague phrase "superintending control," so often used in our state constitutions to confer extraordinary powers on the appellate court, justify interference with the action of the inferior courts? It has been variously construed to allow the appellate court to compel a change of venue,[1] to order an inferior court to go on with a criminal proceeding when it has wrongfully quashed a complaint,[2] and to issue a mandamus ordering the lower tribunal to grant a creditor an opportunity to examine an assignee.[3] The power is broad and indefinite, but the most liberal courts refuse to exercise it where other relief is provided and no emergency requiring immediate action exists.[4] The North Dakota court in the case of *Lowe v. District Court* (1921, N. D.) 181 N. W. 92, has gone further than would seem to be justified by its own previous decisions or by the construction put upon the phrase by the most liberal courts.[5] The applicant for the exercise of this power

---

departed from a previously settled rule. See *Yates v. Yates, supra* note 2, for instance, where the testator left unimproved real estate to trustees with "absolute discretion" of sale. Cardozo and Hogan, JJ., dissented in the instant case; they concurred in the Spencer case.

[4] *Sitwell v. Bernard* (1801, Ch.) 6 Ves. 520, is the leading case. *Gibson v. Bott* (1802, Ch.) 7 Ves. 89; *Kilvington v. Gray* (1825, Ch.) 2 Sim. & Stu. 396; *Walker v. Shore* (1815, Ch.) 19 Ves. 387; *Taylor v. Clark* (1841, Ch.) 1 Hare, 161; *Wilkinson v. Duncan* (1857, Ch.) 23 Beav. 469; 6 R. C. L. 1079.

[5] *Kilvington v. Gray, supra* note 4; *Taylor v. Clark, supra* note 4; *Sitwell v. Bernard, supra* note 4; *Tucker v. Boswell* (1843, Ch.) 5 Beav. 607; *Sargent v. Sargent* (1869) 103 Mass. 297.

[1] For a general discussion of the recent cases involving the exercise of this power see 20 L. R. A. (N. S.) 942, note.

[2] *State, ex rel. Umbreit, v. Helms* (1908) 136 Wis. 432, 118 N. W. 158.

[3] *State, ex rel. Fourth Nat'l Bank, v. Johnson* (1899) 103 Wis. 591, 79 N. W. 1081.

[4] *State, ex rel. Red River Brick Corp., v. District Court* (1912) 24 N. D. 28, 138 N. W. 988.

[5] *State, ex. rel. Att'y Gen., v. District Court* (1904) 13 N. D. 211, 100 N. W. 248; *Long v. Kaufman Co.* (1910) 127 La. 333, 53 So. 583; see also *State, ex rel. Bank, v. Johnson, supra* note 3; *State, ex rel. Red River Brick Corp., v. District*

was charged with statutory rape, and by some peculiar trick of fate and politics, was brought up for trial before a judge whom he had just defeated for re-election after a bitter contest. An affidavit of prejudice having been filed, the judge ordered a transfer to Ramsey County without designating a presiding judge, as required by statute. Ramsey County, a stronghold of the anti-Nonpartisan Leaguers, was equally unsatisfactory to the accused, a Nonpartisan. He applied to the Supreme Court for the issuance of a writ to compel the transfer to McHenry or Renville Counties. The court, without remanding the case to the lower court to correct the irregularity in its proceedings, designated a county and judge "to effect a speedy trial." The two dissenting judges refused to recognize that the exigency of the case demanded the exercise of this unusual power. The split in the court on political lines would seem to indicate that the peculiar political situation in North Dakota was an important factor in the decision.

In *Tremblay v. Despatie* (1921, P. C.) 37 T. L. R. 395, the issue was finally settled as to whether the courts of the Province of Quebec could recognize religious impediments to marriage as grounds for annulment. It was admitted that had the fact as to the relationship of the parties been known to the officiating priest at the time, he could have required a dispensation before performing the ceremony. The Privy Council reversed the Supreme Court of Canada and held that the marriage was valid. Although there is practically no authority directly on the point, the decision is in accord with what has been elsewhere accepted as the rule, that the law will not recognize a disability of a religious character.[1] It has been held that a Hindu domiciled in India could not set up a personal disqualification for marriage outside his caste and religion in order to impeach the validity of a marriage with an English woman in England solemnized according to English law.[2] The decision puts an end to any possible claims which religious authorities of any denomination may have had that the courts should give religious disabilities operative effect at law.

Court, supra note 4. And see also *State, ex rel. Anaconda Copper Co., v. District Court* (1901) 25 Mont. 504, 65 Pac. 1020 where, by "a writ of supervisory control," the lower court was required to reverse an order that it had made allowing the inspection and survey of all underground workings of the petitioner's mines by an adverse litigant. The order so made by the lower court was within its jurisdiction.

[1] 16 Halsbury, *Laws of England* 283 (1911) sec. 524.

[2] *Chetti v. Chetti* [1909] P. 67.